

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

SA.No. 81 of 1994

**AS.177/1993 OF DISTRICT & SESSIONS COURT,TRIVANDRUM,
OS.1949/1988 OF PRL.MUNSIFF COURT, TRIVANDRUM.**
.....

APPELLANT/ APPELLANT/ PLAINTIFF:

**CHRISTUDAS, RESIDING AT PLAMOODU,
PATTOM, DRIVER OF TAX BEARING NO. KMV 3031.**

**BY ADV. SRI.G.S.REGHUNATH,
ADV. SRI. M. RAMASWAMY.**

RESPONDENTS/ RESPONDENTS 1 TO 3/ DEFENDANTS 1 TO 3:

- 1. THE STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY, SECRETARIAT BUILDING,
THIRUVANANTHAPURAM.**
- 2. THE DIRECTOR GENERAL OF POLICE, VELLAYAMBALAM,
THIRUVANANTHAPURAM.**
- 3. THE SUPERINTENDENT OF POLICE, SPECIAL BRANCH C.I.D,
VELLAYAMBALAM, THIRUVANANTHAPURAM.**

BY

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 07/11/2007,THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

M.SASIDHARAN NAMBIAR,J.

S.A.NO.81 OF 1994

Dated 7th November 2007

J U D G M E N T

Plaintiff in O.S.1949/1988 on the file of Munsiff court, Thiruvananthapuram is the appellant. Appellant instituted the suit seeking a decree for realisation of Rs.5620.20 being the balance amount due towards taxi charges. Admittedly appellant is the registered owner of taxi No.KBV-3031. It was engaged by third respondent, Superintendent of Police for the purpose of escorting then Minister of Education. Under Ext.A4 Government Order dated 4/2/1986, taxi charge at the rate of Rs.2.20 per hour of engagement and a detention charge of Rs.2/- per hour is payable. According to appellant, though he is entitled to get a total hire charge of Rs.20,596.60 third respondent allowed only Rs.14,976.40 and he is entitled to get the balance of Rs.5620.20. He claimed the same with 12% interest on the failure of respondents to pay in spite of Ext.A1 notice received under Ext.A8 and as the liability was denied under Ext.A7. Respondents

resisted the suit contending that car was engaged from 20/2/1987 to 25/3/1987 and total distance covered during that period was 6372 k.m and hire charge of Rs.2.20/- per k.m was paid and apart from Rs.14,976.40/- appellant is not entitled to claim any other amount. Learned Munsiff on the evidence of Exts.A1 to A8 dismissed the suit holding that total mileage covered during the period was 6372 kms. and as provided under Ext.A4 Rs.14,018.40 was due and that amount was paid and therefore appellant is not entitled to the balance amount. Appellant challenged the decree and judgment before District court, Thiruvananthapuram in A.S.117/1993. Learned District Judge at the admission stage, dismissed the appeal under Rule 11 of Order XLI of Code of Civil Procedure holding that claim of the appellant was that he is entitled to Rs.20,596.60 without explaining how he is entitled to the amount and therefore appeal is not maintainable. It is challenged in this appeal.

2. Appeal was admitted formulating the following substantial questions of law.

- 1) Can the first appellate court dismiss the appeal without giving opportunity to the appellant to

substantiate the case.

2) Should not principles of natural justice complied with by the lower court.

3) Should an amendment of the pleading allowed at any stage of the suit.

3. Learned counsel appearing for appellant was heard.

4. Arguments of learned counsel is that when respondent admitted the fact that taxi car of the appellant engaged from 20/2/1987 to 25/3/1987 and 6372 km. were traveled, as provided under Ext.A4 detention charge is also liable to be paid at the rate of Rs.2/- per hour subject to the maximum Rs.30 per day and as the tourist taxi was detained by respondents for the entire period from 20/2/1987 to 25/3/1987, respondents are liable to pay the detention charge as provided under Ext.A4 and if that be so, apart from the payment already made respondents are liable to pay the balance amount claimed in the suit and courts below should have granted the decree. Learned counsel also argued that even though application under Rule 17 of Order VI of Code of Civil Procedure was filed before the trial court, it was wrongly dismissed and first appellate

court did not consider that aspect and hence dismissal of the first appeal at the admission stage was against natural justice and hence judgment is to be set aside.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal, on the facts and evidence. Plaint does not contain an allegation that taxi car was detained by respondents for the entire period from 20/2/1987 to 25/3/1987 though it was contended that it was engaged during the period and 6372 km. was traveled during the period in the taxi car. Argument of learned counsel is that I.A.9056/1996 filed under Rule 17 of Order VI to incorporate a pleading that vehicle was at the service of defendants continuously from 3 p.m on 20/2/1987 to 6 p.m on 25/3/1987, should have been allowed and first appellate court was not justified in dismissing the appeal at the admission stage without granting opportunity to the appellant to amend the plaint.

6. On going through the records, it is clear that I.A.9056/1996 was filed on 8/11/1991, without an application for re-opening the case. Proceeding paper shows that suit was in the special list on 17/9/1991 and after recording that there is no oral evidence for the

parties it was adjourned to 18/9/1991 after marking the documents as exhibits. The case was posted for hearing on 19/9/1991. On that day arguments were heard and suit was posted for judgment to 30/9/1991. Though judgment was not pronounced on that day, it was re-opened and posted to 7/11/1991. The suit was again heard and posted for judgment to 21/11/1991. Application was filed to amend the plaint after posting of the case for judgment and without an application for re-opening the case. In such circumstance, trial court was justified in not allowing the application for amendment of the plaint. Even though dismissal of the suit was challenged before the District court in A.S.117/1993, appeal memorandum does not show that dismissal of the application filed under Order VI Rule 17 was challenged. There is no case in the appeal memorandum that opportunity was not granted to amend the plaint or that dismissal of the application for amendment was unjustified. In such circumstance, appellate court cannot be found fault for not considering the correctness of the dismissal of the application filed under Order VI Rule 17. When there is no such case before the trial court or the first appellate court it cannot be said that the question can

be agitated as a substantial question of law involved in the second appeal. When there is no specific pleading in the plaint that taxi car was detained by appellant through out and therefore respondents are liable to pay detention charges as provided under Ext.A4 appellant is not entitled to the decree sought for. There is no merit in the appeal. Hence appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

=====
M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.81 OF 1994

7th November 2007
=====